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No. 94-81

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1994

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS AND AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY LOCAL NO. 315,
*Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## I.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Atchison, Topeka and Santa Fe Railway Company, Charging Party in the proceedings before the National Labor Relations Board (N.L.R.B.) and Intervenor in proceedings before the Ninth Circuit Court of Appeals, hereby files this brief in opposition to the Petition for Writ of Certiorari herein.[1] As argued more fully below, the Court of

[1]Pursuant to Supreme Court Rule 29.1, Intervenor's parent companies consist of Santa Fe Pacific Corp. and SFP Properties, Inc.; and its subsidiary companies (which are not wholly-owned subsidiaries) consist of The Gulf and Inter-State Railway Co. of Texas, Oklahoma City

Appeals correctly held that the "related-work test" first announced in *Local 761, International Brotherhood of Electrical, Radio and Machine Workers v. N.L.R.B. (General Electric)*, 366 U.S. 667 (1961), does not apply to picketing engaged in at premises which are neither owned by nor proximate to a primary employer's premises. A contrary result would emasculate the protections afforded to neutral employers under our nation's secondary boycott laws, and would eliminate the ability of neutral employers to confine labor disputes to primary employers by means of a reserved gate system. The appellate court thus properly applied the "common situs" picketing rules to Petitioner's picketing of the gates reserved for Santa Fe Railway's employees and customers at its intermodal rail facility in Richmond, California in this instance.

The Court of Appeals' decision accordingly furthered the objectives of the Labor Management Relations Act in all respects, and correctly applied judicial and Board precedent in determining that the Petitioner violated § 8(b)(4)(B) of the Act, 29 U.S.C. § 158(b)(4)(B), in this case. Moreover, there is no conflict among the Circuits, and the Court of Appeals' decision neither conflicts with applicable decisions of this Court or decides an important question of law which has not been, but should be, decided by this Court under Supreme Court Rule 10.1(c). The Petition for Certiorari should therefore be denied.

## II.

## STATEMENT OF THE CASE

Following the commencement of Petitioner's unlawful picketing of gates reserved for Santa Fe Railway and its customers at Santa Fe's Richmond terminal, the Railway

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Junction Railway Co., and Rio Grande, El Paso and Santa Fe Railroad Co.

filed an unfair labor practice charge with Region 32 of the N.L.R.B. on July 13, 1990. A hearing was held before an Administrative Law Judge of the Board in March, 1991, at which evidence was presented by the parties on the unfair labor practice charge. The Administrative Law Judge thereafter rendered his decision on August 7, 1991, finding that Petitioner had violated §§ 8(b)(4)(i)(ii)(B) of the Act as alleged by General Counsel of the Board. (See Appendix B to Petition for Certiorari). The Board affirmed the Judge's findings and conclusions on March 6, 1992, in it decision reported at 306 N.L.R.B. 616.

Subsequently, the Board petitioned for enforcement of its decision, and the Union cross-petitioned for review of the Board's order, to the Ninth Circuit Court of Appeals. On April 1, 1994, the court issued its decision in this matter, entitled *N.L.R.B. v. General Truck Drivers Local No. 315,* 20 F.3d 1017 (9th Cir. 1994), in which it granted the Board's petition for enforcement and denied the Union's cross-petition for review.

## III.

## FACTUAL BACKGROUND

The relevant facts in this case are undisputed and are set forth at length in the Administrative Law Judge's decision, reprinted at pp. B-10 to B-55 of the Petition for Certiorari. At root, this case involves an attempt by Petitioner Teamsters Local 315 to shut down Santa Fe Railway's intermodal railroad terminal in Richmond, California in 1990, pursuant to a dispute between the Union and Piggyback Services, Inc., an intermodal freight-handling contractor at the terminal. The picketing had a substantial effect on the movement of massive amounts of goods flowing interstate commerce, including automobiles, steel, petroleum, lumber and military tanks which daily pass through the Richmond terminal. The picketing had the ultimate effect of actually shutting the

railroad terminal down for a brief period of time, until a federal district court could issue an injunction against seven separate rail unions compelling their members to go back to work and to refuse to honor the Teamsters' unlawful picket lines.

The dispute began when Piggyback Services, Inc. took over the intermodal "ramping and deramping" contract at the Richmond terminal for Santa Fe Terminal Services, Inc., which had previously been signed to an agreement with the Union. Prior to the initial appearance of pickets at the Richmond terminal, Santa Fe established a reserved gate for Piggyback Services and its employees, as well as separate reserved gates for Santa Fe's employees and the employees of the truck hauling companies which entered and exited the terminal hundreds of times daily to pick up and deliver freight for shipment on Santa Fe's rail line.

The Union began picketing the gate reserved for Santa Fe's trucking customers on July 12, 1990,[2] which caused Santa Fe and its customers to arrange for a temporary "drop-off site" near the terminal for the purpose of picking up and draying freight into the terminal. Seeking to apply greater pressure to Santa Fe in its ongoing dispute with Piggyback, the Union began picketing the east entrance to the facility, also known as "Indian Crossing," at which the trains actually entered the Richmond terminal, on August 10. The picketing at this entrance to the terminal had the effect of stopping trains entering the rail yard.[3] On the same date, the Union commenced picketing two separate railroad

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[2]All dates are 1990 unless otherwise indicated.

[3]As noted in the petition, a majority of the freight hauled into and out of the rail terminal is "non-intermodal" in nature, consisting of freight that the Piggyback Services employees did not load or unload off of rail flatcars. (See Petition, p. 4).

spurs at the west end of the terminal, which led to an industrial zone and the Port of Richmond.

The Union later escalated its picketing even further to the gates reserved for Santa Fe's employees on August 24. In honor of the picket lines established there, no Santa Fe train crews or clerical employees reported to work between August 25 and August 27, and only returned to work when an injunction was obtained against the rail unions compelling their members to go back to work under their labor agreements. (See Petition, pp. B-52 to 55). Undaunted by this occurrence, however, the Union extended its picketing one further time the very next day to a "drop-off lot" over one mile away from the terminal, at which no Piggyback employees were ever present.[4] During the course of its dispute with Piggyback, the Union also distributed handbills to Santa Fe's customers and employees asking them to refuse to perform any work inside the terminal in conjunction with Piggyback's employees. (*See* Petition, pp. A-34 to A-40).

As found by the Administrative Law Judge, the Board, and the Court of Appeals, this unlawful escalation of the union's picketing had the obvious purpose and effect of enmeshing entirely neutral parties, including Santa Fe Railway, United Parcel Service, and other Santa Fe customers, in the Union's ongoing dispute with Piggyback Services, in rank violation of § 8(b)(4)(B) of the Act. Under the facts and circumstances of this case, a clearer violation of the Act's secondary boycott prohibitions could hardly be established.

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[4]The Union's picketing program was accordingly anything but one which was engaged in with the purpose of "restricting the impact of the labor dispute to the primary employer," as Petitioner contends. (See Petition, p. 27).

## IV.

## LEGAL ARGUMENT

Petitioner seeks to shield its unlawful secondary conduct in this case by arguing that the "related-work test" set forth in the Supreme Court's decision in *General Electric* should be applied to common work situses owned or controlled by neutral employers. More specifically, Petitioner contends that the law should be changed to make all persons who perform work "necessary to the normal operations of the primary employer" at such sites legitimate objects of union picketing. This contention is both patently contrary to well-established decisional law and antithetical of the overriding purposes of the statute.

Section 8(b)(4)(B) of the Act generally makes it unlawful to induce or encourage any individual employed by any person engaged in commerce, or to threaten, coerce, or restrain any person engaged in commerce, where in either case an object thereof is to force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer or to cease doing business with any other person. This statutory scheme makes unlawful secondary boycotts whose "sanctions bear not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO (General Electric Co.) v. N.L.R.B.*, 366 U.S. 667, 672, 81 S.Ct. 1283, 6 L.Ed.2d 592 (1961) (hereinafter *"General Electric"*). The Act is thus violated when the conduct engaged in by the union is addressed "not to the labor relations of the primary employer vis-a-vis his own employees, but is tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612, 644, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967).

In *General Electric*, 366 U.S. 667, 680, the Supreme Court considered the legality of a union's picketing of separate gates reserved for certain maintenance contractors at a struck employer's plant. The Court held that if the work performed by the contractors was related to the "normal operations of the struck employer," and was of the kind that would necessitate curtailing those operations, such contractors could be lawfully picketed at the struck G.E. plant. *Id.* at 681-2. In fashioning this test, the Court did not address whether the "related-work" test would apply to picketing occurring at a common situs occupied by a neutral employer when the primary employer performed services related to the neutral site owner's operations. In fact, the Supreme Court noted with approval language contained in the Board's decision in *Retail Fruit and Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856, 860, fn. 10 (1956), in which the Board stated that "more latitude [should] be given to picketing at . . . separate primary premises than at premises occupied in part (or entirely) by secondary employers." See *General Electric*, 366 U.S. at 679.

Both the N.L.R.B. and the courts subsequently acknowledged that the Supreme Court in the *General Electric* case had addressed only picketing conducted at a struck plant itself, and that it did not attempt to formulate any rules for determining the legality of picketing away from a struck facility operated by the primary employer. *See Kinty v. United Mine Workers of America*, 544 F.2d 706, 714-5 (4th Cir. 1976); *National Maritime Union v. N.L.R.B.*, 367 F.2d 171, 178 (8th Cir. 1986). The Board thus stated long ago that:

> Over the years, the distinction between common situs picketing and that which occurs at premises occupied solely by the struck employer has been a guiding consideration in Board efforts to strike a balance between the competing interests underlying the boy-

> cott provisions of the Act. Mindful of the fact that "Congress did not seek, by § 8(b)(4), to interfere with the primary strike," the Board has given wide latitude to picketing and related conduct confined to the sole premises of the primary employer. On the other hand, in the interest of shielding "unoffending employers" from disputes not their own, the Board has taken a more restrictive view of common situs picketing, requiring that it be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees."

*Building and Construction Trades Council of New Orleans (Markwell and Hartz, Inc.)*, 155 NLRB 319, 324 (1965), *enf'd.*, 387 F.2d 79, 83-84 (5th Cir. 1967).[5] Petitioner's contention that ownership or control of the premises involved in common situs labor disputes "is not an important component in analysis for purpose of § 8(b)(4)(B) of the Act" is therefore devoid of any support whatsoever and is directly contrary to long-established precedent.

In fact, authority cited in Petitioner's brief readily supports this distinction. In *Seafarers International Union v. N.L.R.B.*, 265 F.2d 585 (D.C. Cir. 1959), the court was confronted with the legality of a union's picketing of a ship being repaired at a neutral employer's repair yard, pursuant to a labor dispute between the union and an oil drilling operator which leased the ship. Finding that the oil drilling company was engaged in its normal business operations in overhauling and repairing the ship at the repair yard, and that the ship actually constituted the "situs of the primary

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[5]Moreover, at least one federal district court adopted the Board's rationale in this case, in enjoining a union's picketing at a rail yard under virtually identical circumstances. *See Calatrello v. Teamsters Local 407*, 141 LRRM (BNA) 2778, 2782 (N.D. Ohio 1992).

dispute," the union's picketing at the ship yard was found lawful, under circumstances in which no reserved gates were established. In so holding, the court of appeals stated that:

> No matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of § 8(b)(4).

*Id.* at 591. The court therefore clearly recognized the distinctive interests which are involved when picketing occurs at a primary as opposed to secondary employer's premises, as did the Ninth Circuit Court of Appeals in this case.

Strangely, Petitioner also seeks to rely on the Board's decision in *Sailor's Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), the very case which established the "common situs" picketing rules which govern this case. In that case, the Board did in fact find that a union's picketing at the entrance to the main gate of a ship repair yard to be lawful, when the primary employer's ship was in the process of being readied for sail within the yard. However, in direct contrast to the instant case, there were no reserved gates established for use of the employees of the primary employer, and for those of neutral employers, working at the site. Of course, it is by instituting such a reserved gate system that neutral employers have historically been able to confine the union's picketing of the primary employer at places "reasonably close to the situs," in accordance with the *Moore Dry Dock* rules. *See J.F. Hoff Elec. Co. v. N.L.R.B.*, 642 F.2d 1266, 1270 (D.C. Cir. 1980), *cert. den.* 451 U.S. 918, 101 S.Ct. 1997, 68 L.Ed.2d 310 (1981).

The reasons for applying different rules to picketing engaged in at primary employer's premises, as opposed to those of a secondary employer, are based on both common sense and the salutary purposes of the secondary boycott law. A primary site owner such as General Electric can more easily assume the risks of the effects that the picketing will have on its business operations, and can even shut down or lock out its employees in an ongoing labor dispute. The primary site owner thus has control over the course of labor dispute at all times, and is always able to resolve it by simply agreeing with the union's demands. The secondary site owner, however, has no control over the resolution of the labor dispute, and does not voluntarily assume the risks of picketing which deleteriously affects its business enterprise. In such circumstances, the secondary site owner thus clearly retains the status of a "neutral" employer under the Act, which is entitled to protection from union pressures "designed to involve them in disputes not their own." *National Woodwork Mfrs. Assoc., supra,* 386 U.S. at 625-6.

Indeed, if Petitioner's position were correct, and the *General Electric* "related-work test" was in fact applied to common work situses based merely on a determination that the neutral employer's operations were "essential" to a primary employer's operations, absurd and extremely undesirable results would follow, particularly in cases such as this one in which a service contractor performs one function in a large integrated common situs operation. Thus, under the Union's test, it would be entitled to picket, notwithstanding the establishment of valid reserve gates:

(1) all of the entrances to an airport, including those set aside for pilots, flight attendants and the traveling public, in the event the union had a dispute with a food service contractor which prepared and transported meals to the airplanes;

(2) all of the entrances leading into a bus depot, including those set aside for drivers, concessionaires, ticket agents, and passengers, pursuant to a dispute the union had with a ground service contractor responsible for loading and unloading baggage at the terminal;

(3) every entrance leading into a school, including those reserved for students, teachers, and other school employees, pursuant to a dispute it was engaged in with the maintenance contractor at the school;[6] and

(4) the main entrance to a naval supply center used by U.S. Navy personnel, pursuant to a dispute it was engaged in with a trucking company which contracted to stuff and dray seagoing containers.[7]

In each of the above cases, the operations of the larger secondary site owners are obviously "necessary" to the "essential operations" of the primary employer; indeed, without the existence of the neutral site owners and their customers, there would obviously be no need for these various service contractors to even be present or doing business at the common situs. However, each of these site owners is manifestly and without question entitled to the protections afforded them by the establishment of a reserved gate system under § 8(b)(4) of the Act under well-established law. As the court below expressly found, the Union's argument in this case would therefore "render the statute

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[6]These were the facts of *Local 32B-32J Service Employees International Union (The Dalton Schools)*, 248 NLRB 1067, 1069 (1980), in which the Board rejected the union's attempt to apply the *General Electric* doctrine to the common situs owned by the school as "patently without merit" and as an attempt to "grossly distort the purposes" of the Supreme Court's decision in that case.

[7]Such were the facts of *Teamsters Local 70 (U.S. Department of Navy)*, 261 NLRB 496, 500-1 (1982), in which the Board found a violation of § 8(b)(4)(B).

powerless to protect against conduct Congress clearly intended to prohibit," and would eliminate the protections afforded neutral employers under the Act. *N.L.R.B. v. General Truck Drivers, supra,* 20 F.3d at 1023-4, citing *Kinty, supra,* 544 F.2d at 715.

Petitioner also heavily relies on the close working relationship between the Santa Fe Railway and Piggyback Services employees in arguing for an extension of the *General Electric* "related-work" test to this case. However, it is precisely because of the close working relationship and necessary interdependence between contractors in the construction industry that the Board and the courts have refused to apply the related-work test to that industry, as to do so would operate to deny truly neutral employers the statutory protections of § 8(b)(4) and seriously impede commerce thereby. *N.L.R.B. v. Denver Building Trades Council,* 341 U.S. 675, 689-90, 71 S.Ct. 943, 95 L.Ed. 1284 (1951); *Ironworkers Local 433 (Chris Crane Co).,* 294 NLRB 182, 183 (1989), *enf'd.* 883 F.2d 1024 (9th Cir. 1980). Very similar policy concerns exist in the instant case, and preclude the application of the "related-work" test to rail freight terminals and other centers of interstate commerce at which some interdependence between a transportation carrier and independent contractors is always necessary for the proper functioning of the common situs.

Moreover, and contrary to Petitioner's assertions, the Board and the courts have not merely rejected the application of the "related work" test to the construction industry setting. In *National Maritime Union (Farmers Union Grain Terminal Association),* 152 NLRB 1447, 1458-9 (1965), *enf'd* 367 F.2d 171, 177-8 (8th Cir. 1966), the Board reviewed the legality of a union's picketing of various companies which cleaned, repaired, loaded, and towed barges which were transported on a waterway by a struck barge towing company. Finding that the towing company was

"neither the original nor final transporter," but only serviced "a portion of the total tow," the Board found the picketing of neutral employers who delivered and received the freight towed by the towing company to be unlawful. The Board and Court of Appeals expressly rejected the union's appeal for application of the "related work test" in that case, analogizing the primary employer's business to interlining operations performed by truckers which are protected from secondary pressures under the Act. Similarly, in this case, Piggyback serviced only "one portion of the total tow" of the intermodal freight, thereby analogously rendering both the deliverers and ultimate transporters of the rail freight neutral employers who were legally insulated from the Union's picketing under § 8(b)(4).

To accept Respondent's contention would therefore effectively repeal § 8(b)(4) of the Act as applied to Santa Fe's rail operation and the business of its intermodal customers in this case. Under the foregoing authorities, the mere fact that Santa Fe either delivered freight to, or received freight from, Piggyback Services did not destroy its status as a neutral employer or compromise its ability to protect itself against picketing at its rail terminal under the *Moore Dry Dock* "common situs picketing" rules. Furthermore, to sanction the Union's picketing at the Richmond terminal in this instance would permit a labor dispute to be extended to all neutral employers in a chain of transit merely because they are intermediaries of goods handled by a struck employer — a result clearly repugnant to the purposes of the statute. The Board and Court of Appeals therefore properly found that Petitioner's picketing of the Santa Fe employee gates, the Indian Crossing entrance, the railroad spurs, and the "drop-off site" unlawfully induced neutral employees to refuse to perform their work, and unlawfully coerced and restrained Santa Fe with the intent to enmesh Santa Fe in the Union's dispute with Piggyback, in violation of § 8(b)(4)(i)(ii)(B) of the Act.

Finally, Petitioner contends, without citing any authority, that "there is no justifiable distinction" between suppliers to a primary employer at a common situs and employers whose operations are "essential to the normal operations of the primary employer." This argument ignores forty-seven years of precedent under the Taft-Hartley Act, in which the Board and courts have consistently held that "suppliers" who deliver goods for the direct use of a primary employer at a common situs are legitimate objects of union picketing, but that those who merely perform "related work" at the site are not. *J. F. Hoff Electric Co. v. N.L.R.B., supra,* 642 F.2d at 1273-4. This rule is entirely consistent with the Congress' intent, which was to prohibit unions from engaging in secondary conduct against third persons who are not in "cahoots with" the primary employer. 94 Congressional Record 8709 (1947).

By way of illustration, unionized teachers could not be the legitimate targets of a union's picketing pursuant to its dispute with the maintenance contractor at a school such as occurred in *Dalton Schools, supra,* merely because the teachers created refuse and thereby produced "related work" for the janitors. Rather, the only lawful targets of such picketing (other than the contractor) would be the actual suppliers of janitorial equipment and supplies, who could be required to use a gate reserved for the picketed maintenance contractor at the common situs. This rule furthers the law's intent that those companies who make voluntary and conscious choices to aid a struck employer, for their own economic gain, be required to cross a picket line in order to continue doing business with the primary employer at a common situs, but that other employers on the site retain their status as neutrals and their right to remain insulated from the coercive effects of the union's

picketing.[1] There is accordingly no reason whatsoever to revisit this well established demarcation line between primary and secondary activity at this time.

This Court held over forty years ago, in *Denver Building Trades, supra,* that the relationship between independent contractors "doing business" with one another does not "make the employees of one the employees of the other" or otherwise legitimize the picketing of a contractor, such as Santa Fe, pursuant to a labor dispute between a union and its subcontractor, such as Piggyback Services. *Ibid.,* 341 U.S. at 689-90. There is no logical, just, nor principled reason for reversing this long-standing authority, and to do so would open a Pandora's Box of secondary activity which would directly contravene the well-defined purpose and intent of the secondary boycott laws.

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[1]Both the Board and Court of Appeals found that neither Santa Fe nor its customers were "suppliers" of Piggyback Services in this case, and Petitioner herein does not so contend. (See Petition, pp. A-32 to A-34.)

## V.

## CONCLUSION

For all of the foregoing reasons, this petition raises issues which have been settled by this Court for the past four decades, and should therefore be summarily denied.

Dated: August 3, 1994

Respectfully submitted,

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